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QUICK, BEFORE IT MELTS: TOWARD A RESOLUTION OF THE JURISDICTIONAL MORASS IN ANTARCTICA

Even before its discovery, Antarctica was the subject of debate and controversy.¹ After the existence of the once-hypothetical southern continent was established, the controversy shifted from the classroom to the political arena. Anticipating a variety of benefits, one nation after another eagerly attempted to gain an Antarctic foothold. In the course of this international ice rush, several nations staked sovereign claims to areas which frequently overlapped. As a result, national rivalries were aroused, and Antarctica became a hotbed of tension and mistrust.

Despite this atmosphere, the last two decades have witnessed the emergence of the Antarctic as a fertile field for the growth of cooperative scientific investigation at the international level. This development began in the mid-1950's with the International Geophysical Year,² during which the various concerned nations agreed to set aside their differences for the good of science. This cooperative regime has continued up to the present time under the terms of the Antarctic Treaty.³ In addition to benefitting science,⁴ this attempt to isolate Antarctica from

1. For a discussion of early theories postulating the existence of a southern continent, see Gould, *Antarctica in World Affairs*, 128 FOR'N POLICY ASS'N HEADLINE SER. 11 (1958) [hereinafter cited as Gould, *Antarctica*]. See also P. JESSUP & H. TAUBENFELD, CONTROLS FOR OUTER SPACE AND THE ANTARCTIC ANALOGY 139 (1959) [hereinafter cited as JESSUP & TAUBENFELD].

2. The I.G.Y., which officially ran through 1957 and 1958, was an international effort to foster scientific cooperation in a number of fields. The I.G.Y. program was directed by a Special Committee of the International Council of Scientific Unions. Antarctic activity figured prominently in the plans of the Special Committee, with Regional Conferences on Antarctica taking place as early as 1955. Hayton, *The Antarctic Settlement of 1959*, 54 AM. J. INT'L L. 349, 353 n.18 (1960) [hereinafter cited as Hayton, *Settlement*]. For a more detailed treatment of the I.G.Y. in Antarctica, see PRESIDENT'S SPECIAL REPORT ON UNITED STATES POLICY AND INTERNATIONAL COOPERATION IN ANTARCTICA, H.R. DOC. NO. 358, 88th Cong., 2d Sess. 3-6 (1964).

3. Signed at Washington, December 1, 1959, [1961] 1 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 [hereinafter cited as The Antarctic Treaty]. The Treaty entered into force on June 23, 1961, after the deposit of instruments of ratification by all twelve signatory nations. The original signatories were Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom, and the United States. Seven nations have since acceded to the Treaty. These nations are Poland (1961), Czechoslovakia (1962), Denmark (1965), the Netherlands (1967), Romania (1971), East Germany (1974), and Brazil (1974). C. BEEBY, THE ANTARCTIC TREATY 4 n.5 (1972) [hereinafter cited as BEEBY]; TREATIES IN FORCE (1976).

4. For an indication of the scientific advances being made in Antarctica, see Browne, *All the Polar World is Their Laboratory*, N.Y. Times, Dec. 30, 1974, at 2, col. 4.

international tension demonstrates the viability of efforts to foster a more far-reaching atmosphere of international harmony.⁵

Notwithstanding this relaxation of international tension, as human involvement in Antarctica increases, so must the human problems that have traditionally plagued the course of frontier expansion. Recognizing this fact, several nations have extended the reach of their criminal laws to Antarctica. This Note examines these assertions of national jurisdiction⁶ within the context of the still-smoldering dispute over territorial sovereignty in Antarctica. Pointing out the frequently intimate relationship between sovereignty and the exercise of jurisdiction within a territory, the discussion suggests that the existing harmony could well be disrupted by the enforcement of national legislation in Antarctica. It concludes by proposing a new accommodation of national interests—an accommodation more carefully calculated to preserve the future of Antarctic cooperation.

5. President Dwight D. Eisenhower referred to the Treaty as "unique and historic . . . an inspiring example of what can be achieved by international cooperation in the field of science and in the pursuit of peace." 106 CONG. REC. 2451 (1960). The Antarctic Treaty was a pioneer agreement in a number of areas. It led the way in the move toward limitation of nuclear explosions and the disposal of radioactive waste (Article V), codified efforts to demilitarize the entire continent (Article I) and established a wide-open inspection system designed to insure that the provisions of the Treaty are followed (Article VIII). For a detailed discussion of these and other provisions of the Treaty, see Hayton, *Settlement*, *supra* note 2. See also F. AUBURN, *THE ROSS DEPENDENCY* 35-44 (1972) [hereinafter cited as AUBURN]. The treaty is still regarded as a forward-looking example of international cooperation, although it is clear that the advanced form of international administration which some had hoped for is not likely to come about in the foreseeable future. Cf. *id.* at 36; Hayton, *Settlement*, *supra* note 2, at 367. It is often speculated that the Antarctic experience could provide a useful model for the development of amicable relations in outer space. See *id.* at 367. See generally JESSUP & TAUBENFELD, *supra* note 1. For an interesting comparison with the Antarctic Treaty, see Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, done at Washington, London and Moscow, January 27, 1967, [1967] 3 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

6. The term "jurisdiction" is used here to refer to the power behind the rule-making aspect of the authoritative decision-making process ("legislative jurisdiction"). This Note deals with problems surrounding the spatial reach of this legislative power. No attempt is made to deal with concepts unique to the adjudicatory process, such as subject matter and personal jurisdiction. Nor does this discussion consider related extradition problems. It has been asserted that the "legislative jurisdiction" concept "suggests the drawing of precise lines and a precise allocation of legislative competence among states." See H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 892 (2d ed. 1976). To this extent, the usage is misleading, and caution is in order.

I

POLITICAL STATUS QUO: UNEASY ACCOMMODATION OF
CONFLICTING INTERESTS

To appreciate the complexity and practical importance of the jurisdictional problem, it is necessary to examine the uneasy political balance that prevails in Antarctica. Those nations which have attained Antarctic footholds have done so for a variety of reasons,⁷ often at the expense of the claimed rights of other states. The degree of emphasis with which each nation asserts its position varies considerably, but the conflicting interests present a precarious foundation for the edifice of Antarctic cooperation.

A. TERRITORIAL CLAIMS IN ANTARCTICA

Seven nations have staked claims, which sometimes overlap, to areas of Antarctica comprising about eighty per cent of the continent's surface.⁸ The United States has refrained from either recognizing these claims or asserting a claim of its own.⁹ Nonetheless, extensive American

7. Among the reasons which have led nations to become involved in Antarctica, the most important are Antarctica's potential as a source of natural resources and the continent's possible strategic significance. See *Hearings On The Antarctic Treaty Before the Senate Comm. on Foreign Relations*, 86th Cong., 2d Sess., at 5 (1960) [hereinafter cited as *Antarctic Treaty Hearings*]; Gould, *Antarctica*, *supra* note 1, at 33. For a discussion casting doubt upon the practical economic value of Antarctica's supposed mineral riches, see Potter, *Economic Potentials of the Antarctic*, 4 *ANTARCTIC J. OF THE UNITED STATES* 61 (1969). In addition to these pragmatic motives, all concerned nations appear to be acting in a spirit of competition as a matter of national pride. See *AUBURN*, *supra* note 5, at 4.

8. The Antarctic claimants, together with the year in which each advanced its claim, are the United Kingdom (1908), New Zealand (1923), France (1924), Australia (1933), Norway (1939), Chile (1940), and Argentina (1942). In addition, South Africa has staked an apparently unchallenged claim to certain sub-Antarctic islands. See *JESSUP & TAUBENFELD*, *supra* note 1, at 143-53. Before World War II, Japan and Germany each made vague pretensions to Antarctic claims, but they have since ceased to press the point. Hayton, *Settlement*, *supra* note 2, at 350-51 nn.6&7. The claims of Argentina, Chile, and the United Kingdom overlap in the Palmer Peninsula region. For a map showing the location of all Antarctic claims, see *JESSUP & TAUBENFELD*, *supra* note 1, fold-out at 144.

9. In 1924, Charles Evans Hughes, then Secretary of State, set forth the classic United States position that the discovery of lands unknown to civilization, even when coupled with a formal taking of possession, does not support a valid claim of sovereignty unless the discovery is followed by an actual settlement of the discovered country. [1924] 2 *FOREIGN REL. U.S.* 519-20 (1939). For a discussion of the legal status of the "occupation" standard upon which this position was based, see notes 25-44 *infra* and accompanying text. The Hughes opinion goes on to state that the "impossibility" of "actual settlement" in the polar regions renders polar claims invalid. *Id.* Although technological advances have made "actual settlement" a problematic standard when applied to Antarctic activity, the United States' position has basically remained constant. See 2 *M. WHITEMAN, DIGEST OF*

activity in the Antarctic has created widespread appreciation of special United States interests, including a sort of de facto recognition by other concerned nations that the United States position is preeminent in the major unclaimed portion of the continent.¹⁰ The Soviet Union follows a nonrecognition policy similar to that of the United States¹¹ and has established bases throughout the continent, often to the dismay of claimants who feel that this violates their territorial integrity.¹²

The various conflicting viewpoints created a feeling of intense rivalry which climaxed in the early 1950's when a long-standing dispute between the United Kingdom, Chile, and Argentina erupted in a brief clash of arms.¹³ Subsequently, the United Kingdom asked the Interna-

INTERNATIONAL LAW 1232-63 (1963). Despite this stance, the United States has expressly reserved its right to make a territorial claim. See U.S. Invitation to Twelve Nation Antarctic Conference, May 2, 1958, in PRESIDENT'S SPECIAL REPORT ON UNITED STATES POLICY AND INTERNATIONAL COOPERATION IN ANTARCTICA, H.R. DOC. NO. 358, 88th Cong., 2d Sess., at 23 (1964).

10. The United States' special position in Marie Byrd Land dates from the explorations of Admiral Richard E. Byrd during the late 1920's and 1930's. Gould, *Antarctica, supra* note 1, at 26. For a discussion of the position of other nations with regard to United States interests in Marie Byrd Land, see Hayton, *Settlement, supra* note 2, at 351 n.10, where the author states:

It is no secret that states now claimants would be pleased if the United States would claim this portion [of the continent], thereby at least tacitly recognizing the validity of the sector principle and, by implication, supporting the other claimants in their own sectors.

11. While the Soviets are relative newcomers to Antarctica, having become involved in the continent only since the end of World War II, they point to early explorations by Bellinghousen and Lazarev as the basis for special Soviet rights. See Orlov, *Russian Antarctic Discoveries of 1821 are Basis of Soviet Claim*, 9 U.S.S.R. INFO. BULL. 296 (1949). For an assertion of the Soviet position, see Statement of the U.S.S.R. Delegate to the Antarctic Conference, in *The Conference on Antarctica, Washington, October 15-December 1, 1959*, DEP'T STATE PUB. 7060, at 21-24, 52, 53 (1960). See also Toma, *Soviet Attitudes Towards the Acquisition of Territorial Sovereignty in the Antarctic*, 50 AM. J. INT'L L. 611 (1956).

12. Australia was particularly offended during the International Geophysical Year when the Russians established bases in the "Australian sector." See L. GOULD, *THE POLAR REGIONS IN THEIR RELATION TO HUMAN AFFAIRS* 21 (1958). This uneasiness stemmed largely from Cold War hostilities which led many to question Soviet motives in the Antarctic. See, e.g., *Antarctic Treaty Hearings, supra* note 7, at 11-13, 23-24.

13. From 1947 to 1955, the United Kingdom exchanged numerous protests with Argentina and Chile concerning their overlapping claims in the Palmer Peninsula region. AUBURN, *supra* note 5, at 35. For a collection of some of these exchanges, see 5 POLAR RECORD 228-40 (1948); 6 POLAR RECORD 413-18 (1952); 7 POLAR RECORD 212-26 (1954). In 1948 the intensity of this dispute prompted the three governments to agree to forgo sending warships "south of latitude 60 degrees" unless those ships were carrying out "routine movements such as have been customary for a number of years." 2 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 1238 (1963) (quoting a statement issued by the United Kingdom

tional Court of Justice to resolve this sovereignty question. Argentina and Chile insisted that their sovereignty over the disputed territory was so clearly established that action before the I.C.J. would amount to interference with a purely domestic matter.¹⁴ In the face of this refusal to recognize the Court's jurisdiction, the I.C.J. was forced to dismiss the British application.¹⁵

Since no international tribunal has ruled on the Antarctic sovereignty dispute, and no judgment handed down in a different situation is clearly in point, each concerned state has continued to interpret the relevant principles of international law in accordance with its own interests. The consequent lack of consensus has been accompanied by a solidification of national intransigence on the issue.

1. Asserted Bases of Antarctic Claims

It has long been recognized that nations cannot acquire new territory merely by expressing their desire to do so.¹⁶ Accordingly, those nations that have staked Antarctic claims justify these assertions of sovereignty by pointing to a variety of genuine connections which they have established with their claimed territory.¹⁷ In doing so, these nations generally rely upon some form of actual occupation, which they seek to bolster by

Foreign Office on January 18, 1949). The agreement has since been renewed annually. Hayton, *Settlement*, *supra* note 2, at 352. Despite this precaution, on February 2, 1952, the Argentine navy fired upon a British meteorological party which was attempting to land at Hope Bay, within the disputed territory. The resulting British withdrawal was only temporary, and the matter was settled through consultation at higher levels. Gould, *Antarctica*, *supra* note 1, at 23. The exchange of diplomatic notes is reprinted at 6 POLAR RECORD 413-18 (1952). Hostilities continued intermittently. In February of 1953, forces of the United Kingdom destroyed buildings that had been erected in the Falkland Islands by Argentina and Chile and expelled two Argentine nationals found at the scene. Hambro, *Some Notes on the Future of the Antarctic Treaty Collaboration*, 68 AM. J. INT'L L. 218 n.5 (1974).

14. See *Antarctica Cases* (United Kingdom v. Argentina, United Kingdom v. Chile), [1956] I.C.J. PLEADINGS 89-96. See also JESSUP & TAUBENFELD, *supra* note 1, at 150. As the United Kingdom was quick to point out, this argument seems to have ignored the fact that Argentina and Chile have been unable to resolve a dispute between themselves regarding sovereignty over the same territory. See *Antarctica Cases*, *supra*, at 98.

15. *Antarctica Cases* (United Kingdom v. Argentina, United Kingdom v. Chile), Orders of March 16, 1956, [1956] I.C.J. REP. 12, 15. See *Antarctica Cases* (United Kingdom v. Argentina, United Kingdom v. Chile), [1956] I.C.J. PLEADINGS 79.

16. See note 42 *infra* and accompanying text.

17. For a discussion dealing in part with some of the connections which the various concerned nations have sought to establish with their Antarctic territory, see F. AUBURN, *THE ROSS DEPENDENCY* 15-30 (1972).

claiming that their occupation began with discovery of the claimed territory.¹⁸

Early Antarctic discoveries were limited to a thin perimeter along the coast.¹⁹ Although parts of the interior have since been penetrated, modern forms of occupation are still concentrated, for the most part, in the coastal regions.²⁰ Indeed, much of Antarctica is so remote and inhospitable as to be practically inaccessible and certainly not subject to effective control from coastal establishments.²¹ In spite of this fact, each claiming nation purports to extend the scope of its sovereignty far inland. This extension has been justified through a convenient adaptation of the continuity concept, which claiming nations broadly interpret as allowing the acquisition of vast untouched areas, so long as those regions are contiguous to their coastal establishments.²²

18. See Bernhardt, *Sovereignty in Antarctica*, 5 CALIF. W. INT'L L.J. 297, 318 (1975) [hereinafter cited as Bernhardt, *Sovereignty*]. Argentina and Chile take a different approach. These nations rely heavily upon their geographic proximity to their claimed territories, and also upon a supposed succession to "rights" received by Spain under the Papal Bull of May 4, 1493. Even these two nations, however, recognize that occupation is a crucial element in the acquisition of sovereignty. JESSUP & TAUBENFELD, *supra* note 1, at 145. Antarctic "occupation" consists, for the most part, of scientific bases and weather stations. Token efforts toward administration, such as operation of postal facilities, have also been undertaken by claimant states. See AUBURN, *supra* note 5, at 61; Gould, *Antarctica*, *supra* note 1, at 20. For a discussion of the legal status of occupation and discovery as bases for territorial claims, see note 25 *infra* and accompanying text.

19. A shroud of uncertainty surrounds the true story of the discovery of Antarctica. It appears as though the continent may have been originally sighted in the early 1800's by sealers who guarded their secret lest others share in the untapped bounty of Antarctic fur seals. See Gould, *Antarctica*, *supra* note 1, at 12. By 1830, explorers from many nations were sailing the Antarctic seas. The first notable historic claim to arise from these explorations was put forth by Dumont D'Urville in 1840, when he claimed the coast of present-day Adélie Land for France. Bernhardt, *Sovereignty*, *supra* note 18, at 317. It was not until the early twentieth century, however, that claims based upon discovery were formally asserted. *Id.* at 318. For a discussion of early Antarctic explorations in the context of their relationship to territorial claims, see JESSUP & TAUBENFELD, *supra* note 1, at 139-59. See also AUBURN, *supra* note 5, at 18-20.

20. A few early expeditions penetrated deep into the Antarctic hinterland. Roald Amundsen, the Norwegian, reached the South Pole as early as 1911. Bernhardt, *Sovereignty*, *supra* note 18, at 318. Some nations have established scattered bases far inland. The Amundsen-Scott South Pole station, established during the I.G.Y. by the United States, was one of the first inland bases. See Gould, *Antarctica*, *supra* note 1, at 37-42. See also JESSUP & TAUBENFELD, *supra* note 1, fold-out at 144. The Soviets have established a base near the geographic center of the continent. See N.Y. Times, June 13, 1973, at 2, col. 4.

21. Even some coastal terrain is nearly inaccessible. Until 1960, no landing had been successfully attempted on the forbidding coast of Marie Byrd Land. Two United States icebreakers finally accomplished the task, but only after laboring through nearly a thousand miles of ice-encrusted sea. Hayton, *Settlement*, *supra* note 2, at 351 n.10.

22. Generally, the continuity (or hinterland) concept is used to justify the inward exten-

The Antarctic pie has consequently been cut into national sectors, the boundaries of which reach to the South Pole.²³ Those nations which question the validity of the underlying claims quite naturally refuse to observe these extended boundaries. Significantly, despite the fact that the sector scheme resulted from a desire to reduce tensions among claiming nations, the proper delineation of these boundaries is a point of contention even among that group of states.²⁴

2. *Significance of "Occupation" to the Acquisition of Sovereignty*

According to the traditional view, sovereignty over no man's land can be acquired only through actual occupation of the claimed territory.²⁵ This idea stems from the premise that the most efficient allocation of

sion of well-founded coastal claims "as far as is necessary for the integrity, security, and defence of the land actually occupied." 1 L. OPPENHEIM, *INTERNATIONAL LAW* 512 (7th ed. 1948). For a discussion of the early application of this rationale, see G. SMEDAL, *ACQUISITION OF SOVEREIGNTY OVER POLAR AREAS* 43-44 (1931) [hereinafter cited as SMEDAL]. During the African colonial era, the continuity concept emerged as a convenient device for controlling colonial rivalries. The concerned nations divided the administration of "unoccupied" African lands among themselves. This apportionment was only tangentially related to "security," and it represented a blatant effort to reserve interior territory as a "sphere of influence and interest" of the state which occupied the contiguous coastline. See Bernhardt, *Sovereignty*, *supra* note 18, at 343-44. Cf. SMEDAL, *supra* at 44. Similar concerns motivated the extension of claims in Antarctica. The division of Antarctic territory into sectors dates from the 1920's when the claims controversy began in earnest. It was the result of early efforts to achieve a mutual recognition of claims designed to limit the impact of emerging rivalries. BEEBY, *supra* note 3, at 5. It has been pointed out that, far from giving rise to accepted principles of international law, these types of compromises can at most bind the participating nations. See SMEDAL, *supra* at 44-45. Even if the continuity concept were accepted as a general principle of international law, the Antarctic situation is significantly different from other instances in which sovereignty has been extended on this basis. Antarctic sector claims are based upon coastal claims which themselves have an uncertain status under international law. See notes 25-44 *infra* and accompanying text. For a general discussion of the various theories behind the so-called sector principle, see SMEDAL, *supra* at 54. See also AUBURN, *supra* note 5, at 24-30; Bernhardt, *Sovereignty*, *supra* note 18, at 332-38.

23. See JESSUP & TAUBENFELD, *supra* note 1, fold-out at 144.

24. See note 8 *supra* and accompanying text.

25. Discovery alone has been advanced in some quarters as sufficient basis for the assertion of a valid territorial claim. AUBURN, *supra* note 5, at 18; Gould, *Antarctica*, *supra* note 1, at 20. It appears, however, that the importance of discovery rights in international law has diminished over the years. *Id.* For the United States position on the status of discovery rights, see note 9 *supra*. International law generally requires that priority of discovery be followed by "effective occupation" in order to confer sovereignty over previously unclaimed territory. *Antarctic Treaty Hearings*, *supra* note 7, at 52 (testimony of Philip C. Jessup); Bilder, *Control of Criminal Conduct in Antarctica*, 52 VA. L. REV. 231, 235 n.11 (1966) [hereinafter cited as Bilder, *Criminal Conduct*]. See also notes 30-34 *infra* and accompanying text.

territorial resources can be achieved only by placing those resources at the disposition of the state in the best position to utilize them—necessarily the occupying state.²⁶ Although it has been suggested that the isolation and practical uninhabitability of polar regions makes it impossible to acquire them through occupation,²⁷ the logic behind the occupation requirement does not demand this result. If Antarctic resources are to be allocated at all, the continent's forbidding conditions should diminish the degree of occupation necessary to support a territorial claim.²⁸ Even so, unless some nation establishes a certain minimum degree of occupation in a previously unclaimed region, there is no need—nor any reason—for that region to be subjected to the mastery of any one nation.²⁹

The traditional view is that a nation must establish an *effective* level of occupation in order to acquire sovereignty over a claimed territory. As suggested by the increased acceptance of the allocation of resources rationale, effectiveness has become a flexible—though still very real—standard, the parameters of which are determined by the circumstances of each case.³⁰ At one time, a nation could meet the effectiveness standard only by taking exclusive physical possession of the claimed region, but the emphasis has since been placed on the exercise of governmental functions over the claimed territory.³¹ While nations have seized

26. Bernhardt, *Sovereignty*, *supra* note 18, at 319. Vattel analyzed the role of the occupation doctrine along similar lines:

[I]t is questioned whether a nation can, by the bare act of taking possession, appropriate to itself countries which it does not really occupy, and thus engross a much greater extent of territory than it is able to people or cultivate. It is not difficult to determine that such a pretension would be an absolute infringement of the natural rights of men, and repugnant to the views of nature, which, having destined the whole earth to supply the wants of mankind in general, gives no nation a right to appropriate to itself a country, except for the purpose of making use of it, and not of hindering others from deriving advantage from it.

E. VATTEL, *THE LAW OF NATIONS OR, PRINCIPLES OF THE LAW OF NATURE* 98-99 (J. Chitty trans. 1883).

27. See W. HALL, *A TREATISE ON INTERNATIONAL LAW* 125 n.1 (8th ed. 1924). The original United States position on Antarctic sovereignty was founded upon this conception. See note 9 *supra*.

28. Münch, *Völkerrechtsfragen der Antarktis*, 7 *ARCHIV DES VÖLKERRECHTS* 225, 235 (1958). This seems to be consistent with the developing position of international law. See JESSUP & TAUBENFELD, *supra* note 1, at 141. See notes 40-42 *infra* and accompanying text.

29. See AUBURN, *supra* note 5, at 29; SMEDAL, *supra* note 22, at 37.

30. See Hayton, *The "American" Antarctic*, 50 *AM. J. INT'L L.* 583, 599 (1958). See also notes 33-44 *infra* and accompanying text.

31. The work of the African Conference, which opened at Berlin in 1884, reflected the nineteenth century emphasis on physical possession. SMEDAL, *supra* note 22, at 18. The

upon this relaxed standard in order to bolster broad Antarctic claims through largely nominal measures,³² this reliance ignores recognized limits to the erosion of the effectiveness standard.

The award in *The Island of Palmas Case*³³ recognized that the "actual continuous and peaceful display of state functions is . . . the sound and natural criterium of territorial sovereignty."³⁴ Although this decision did not clearly describe the type of action required to meet this test, the arbitrator relied primarily upon the Netherlands' manifestation of actual control over the disputed territory—including the exercise of jurisdiction on the island.³⁵ The decision in *The Clipperton Island Arbitration*³⁶ reaffirmed the *Palmas* position and provided that the mere ceremonial proclamation of sovereignty has no effect. In *Clipperton*, the arbitrator ruled that the claiming state can acquire sovereignty only by placing itself in such a position that it is "capable of making its laws respected" in the claimed territory.³⁷ The *Clipperton* decision recognized that this overt form of occupation is not necessary when the region is already "at the absolute and undisputed disposition" of the claiming nation,³⁸ but this exception can hardly be applied in the context of the various Antarctic territories.³⁹ Therefore, the status of Antarctic claims

subsequent shift in emphasis has been described as the "natural consequence of the recognition that in modern international law occupation is the acquisition of sovereignty rather than of property." Waldock, *Disputed Sovereignty in the Falkland Island Dependencies*, 25 BRIT. Y.B. INT'L L. 311, 317 (1948). This change in emphasis was marked by the three cases discussed at notes 33-42 *infra* and accompanying text.

32. See AUBURN, *supra* note 5, at 10, where the author discusses the ramifications of the "reduction" of the occupation standard to an "ill-defined minimum."

33. *Island of Palmas Case* (United States v. Netherlands), Hague Ct. Rep. 2d (Scott) 83 (Perm. Ct. Arb. 1932), 2 R. Int'l Arb. Awards 829 (1949).

34. *Id.* at 94, 2 R. Int'l Arb. Awards at 840.

35. See *id.* at 122, 2 R. Int'l Arb. Awards at 863. The arbitrator also emphasized the Netherlands' demonstrated acquisition of commercial privilege in the claimed area as a factor bolstering its assertion of sovereignty.

36. *Clipperton Island Arbitration* (France v. Mexico), 26 AM. J. INT'L L. 390 (1932), translating 6 REVUE GÉNÉRALE DU DROIT INTERNATIONAL PUBLIC 129 (3d ser. 1932).

37. *Id.* at 394.

38. *Id.* See also Van der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 55 AM. J. INT'L L. 448, 463 (1963), which points out that an assertion of sovereignty need not always be accompanied by continual occupation of "every nook and corner" of the claimed territory.

39. In *Clipperton*, the arbitrator upheld France's claim to the tiny island on the basis of little more than discovery and symbolic annexation. Although France undertook no actual settlement and did not attempt to take administrative measures, the arbitrator applied the exception and stated that, in this case, "it is unnecessary to have recourse to this method [of establishing sovereignty]." 26 AM. J. INT'L L. at 394. It has been pointed out that:

In applying the *Clipperton* criteria to Antarctica, the dangers inherent in applying

hinges upon a determination of what action constitutes a display of state functions sufficient to establish the claimant's capability of "making its laws respected" in the claimed territory.

Since the *Eastern Greenland Case*,⁴⁰ the clear trend has been toward a lenient standard in this regard, at least when sparsely populated regions are concerned.⁴¹ Even so, there is no reason to suppose that this leniency has eroded the effectiveness standard so extensively that it now sanctions enormous claims to uncharted—indeed, unseen—lands, unless the claiming state exhibits more than the mere intent to possess that territory.⁴² International law does not clearly define the extent of activity necessary to provide a sound basis for a territorial claim, but it does recognize that this manner of acquiring sovereignty involves a cumulative process of establishing sufficient contacts to justify the claim.⁴³ Until these contacts are established, the claimed territory is legally open to all nations. There is no doubt that a considerable portion of the

formulae developed for a particular geographical entity (such as an island) to another area (such as a continent) must be recognized. While Clipperton Island is completely isolated and uninhabited, small and capable of effective territorial occupation and administration in its entirety with only a few official representatives, the occupation of a continent is not amenable to so cavalier a treatment.

Bernhardt, *Sovereignty*, *supra* note 18, at 330.

40. Legal Status of Eastern Greenland, [1933] P.C.I.J., ser A/B, No. 53.

41. In *Eastern Greenland*, the Permanent Court of International Justice stated:

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.

Id. at 46. Smedal endorsed the *Eastern Greenland* approach, stating:

[Polar] regions are so sparsely peopled that orderly conditions can be maintained by much more simple measures. . . .

Nor will it be necessary in polar regions to make use of so great a civil administration as is required in densely peopled regions.

SMEDAL, *supra* note 22, at 34.

42. Although *Eastern Greenland* recognized a relaxed occupation standard, the Court still maintained that "a claim to sovereignty . . . involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority." [1933] P.C.I.J., ser. A/B, No. 53, at 45-46. According to Smedal:

[A] State wishing to occupy a polar territory must be required to establish a local authority within the territory. . . .

. . . If a polar land is to be occupied, it must . . . be required that the land is controlled permanently and efficiently by the occupying State.

SMEDAL, *supra* note 22, at 34-35.

43. *Minquiers and Ecrehos Case*, [1953] I.C.J. 47, 104. See *AUBURN*, *supra* note 5, at 12.

Antarctic activities of the seven claiming states have been undertaken with this thought in mind.⁴⁴

As a further response to this same concern, each Antarctic claimant has passed legislation in which it purports to extend its criminal jurisdiction to Antarctica.⁴⁵ The effect of this legislation, standing alone, may be questionable, but its actual enforcement would be a significant step toward establishing the claiming state's capability of "making its laws respected" in the claimed territory. By satisfying the occupation standard in this manner, the claiming state could build a strong case for the validity of its claim to sovereignty. For this reason, nations interested in preventing another state from perfecting its claim can be expected to challenge any assertion of jurisdiction in Antarctica that is based upon a claim of territorial sovereignty.⁴⁶

B. ANTARCTIC TREATY: AGREEMENT NOT TO AGREE

The Antarctic claimants overwhelmingly rejected initial proposals for the relinquishment of claims and the internationalization of the continent.⁴⁷ Increasing tensions and the penetration of Antarctica by the Soviet Union soon aroused a greater awareness of the need to avoid

44. AUBURN, *supra* note 5, at 5. The heavy concentration of bases in the disputed Palmer Peninsula region is the result of the conflicting political aspirations of Argentina, Chile, and the United Kingdom. Hayton, *Settlement*, *supra* note 2, at 352. For an illustration of this concentration, see JESSUP & TAUBENFELD, *supra* note 1, fold-out at 144.

45. See notes 60-61 *infra* and accompanying text. Cf. AUBURN, *supra* note 5, at 10.

46. See notes 55-59 *infra* and accompanying text. For a discussion of the relationship between questions of sovereignty and jurisdictional disputes, see BEEBY, *supra* note 3, at 11.

47. The United States made the first concrete proposal for the internationalization of Antarctica. See 19 DEP'T STATE BULL. 301 (1948). Subsequent discussions concentrated on two alternative schemes: a multiple condominium over Antarctica (which would have excluded the Soviet Union just as it was beginning its Antarctic involvement) and a United Nations trusteeship over the continent. BEEBY, *supra* note 3, at 7 n.10. For a discussion of these alternatives and the negotiation process which dealt with them, see Hanessian, *The Antarctic Treaty of 1959*, 9 INT'L & COMP. L.Q. 436, 437-44 (1960). See also Hambro, *Some Notes on the Future of the Antarctic Treaty Collaboration*, 68 AM. J. INT'L L. 217, 224-25 (1974). New Zealand responded enthusiastically to the idea, but the other six claimants could not be persuaded to agree. BEEBY, *supra* note 3, at 7-9. The Soviet Union saw in this proposal a plot to prevent it from establishing a foothold in Antarctica and protested to each concerned nation, stating that it could not recognize as lawful any decision on the future of Antarctica that was reached without Soviet participation. 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1255-56 (1963). A period of diplomatic stalemate ensued, although India did attempt to move things along by suggesting, in 1956, that the United Nations discuss the question of an internationalized Antarctica. U.N. Doc. A/3118/Add. 1, Sept. 13, 1956; U.N. Doc. A/3852, July 15, 1958 (with Explanatory Memorandum). See Hanessian, *Treaty*, *supra* at 451-52.

conflict. In addition, it became clear that the establishment of bases for political reasons could only lead to wasteful duplication of effort, with similar types of bases being concentrated in the most hotly disputed territories. Furthermore, the success of the International Geophysical Year in fostering international scientific collaboration created a widely felt desire that some form of cooperative regime continue.⁴⁸ At the same time, old territorial concerns demanded a clarification—vis-a-vis the occupation standard—of the legal significance of permanent Antarctic bases established during the I.G.Y. program.⁴⁹ These factors led to negotiations and the signing of the 1959 Antarctic Treaty, which was designed to perpetuate the era of good feeling which had begun during the course of the I.G.Y. operation.⁵⁰

In attempting to keep Antarctica free for peaceful scientific cooperation, the negotiating parties recognized that a general agreement providing for the surrender of sovereign claims was an unrealistic alternative. Accordingly, they sought no final solution to the claims problem. Instead, the parties agreed to set the problem aside, at least temporarily, by freezing existing positions, both as to claims and objections to claims.⁵¹ The Treaty also declared a moratorium on new or expanded assertions of sovereignty in Antarctica.⁵² This concept of holding sover-

48. The Soviet Union played a leading role in the I.G.Y. from its inception, and this Cold War program enhanced political rivalries to a certain extent. Officially, however, the I.G.Y. was a scientist-designed and scientist-directed program conducted "off the record" with respect to territorial claims. Hayton, *Settlement*, *supra* note 2, at 353 n.18. Suggestions were made as early as 1957 that the close of the I.G.Y. should not bring with it the end of scientific cooperation in Antarctica. Pending a more far-reaching agreement, 1958 saw the extension for one year of the "off the record" cooperative regime which had begun with the I.G.Y. See Hanessian, *Antarctica: Current National Interests and Legal Realities*, 1958 PROCEEDINGS AM. SOC'Y INT'L L. 145.

49. Hayton, *Settlement*, *supra* note 2, at 353; see Auburn, *supra* note 5, at 35-36.

50. The Preamble of the Antarctic Treaty reflects this goal by recognizing "that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord."

51. Article IV states:

1. Nothing contained in the present Treaty shall be interpreted as:
 - (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
 - (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
 - (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.

52. Article IV also states:

2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sover-

eighty in abeyance was the most significant result of the Treaty negotiations. While its long-range effectiveness remains to be seen,⁵³ it is clear that no agreement could have been reached without this freezing provision and that a continued reconciliation of sovereign claims is essential to the future of Antarctic cooperation.⁵⁴

No such rapprochement was achieved on the closely associated problem of the exercise of jurisdiction. The parties did reach a limited accommodation which provides for the exclusive exercise of jurisdiction over observers and exchanged personnel by the state of their nationality.⁵⁵ Attempts to reach agreement on the jurisdictional status of all other persons foundered because of the fears of some nations that any limitation on their jurisdictional power might hinder their efforts to establish sound bases for their territorial claims.⁵⁶ As a result, the Treaty explicitly provides that the views of the parties on the jurisdiction question remain unprejudiced.⁵⁷ In view of their inability to agree on this

eighty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

There is some dispute as to whether this provision prevents two or more parties from jointly making a new claim. See Auburn, *A Sometime World of Men: Legal Rights in the Ross Dependency*, 65 AM. J. INT'L L. 578 (1971); Hanessian, *The Antarctic Treaty of 1959*, 9 INT'L & COMP. L.Q. 436, 470 (1960)—(both of which maintain that Article IV does not bar new joint claims)—and BEEBY, *supra* note 2, at 11 n.14 (taking the opposite view).

53. Auburn suggests that the Antarctic Treaty could easily lead to—and may already constitute—a form of multiple condominium, whether or not such an arrangement is expressly declared. AUBURN, *supra* note 5, at 14, 36, 82. He describes the condominium as a compromise between states which disagree as to their sovereignty over a given territory but are willing to leave the dispute unsettled. *Id.* at 81. The condominium concept has been severely criticized. See JESSUP & TAUBENFELD, *supra* note 1, at 11-26. For a general discussion of the condominium, see 1 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 56-58 (1940).

54. The Antarctic Treaty provides for no specific termination date, but Article XII establishes an unusual amendment mechanism which will permit dissatisfied parties to undermine the Treaty regime as soon as 30 years have passed from its inception. See BEEBY, *supra* note 3, at 16-17; Hayton, *Settlement*, *supra* note 2, at 364-65. For an interesting, if unconvincing, interpretation which contends that the Treaty provides for withdrawal before the expiration of this 30-year period, see Bernhardt, *Sovereignty*, *supra* note 18, at 310-12. A party could, of course, undermine the Treaty arrangement of any moment by withdrawing its cooperation.

55. Antarctic Treaty, art. VIII (1).

56. BEEBY, *supra* note 3, at 11-12. Some nations were reportedly prepared to swallow this fear at the Antarctic Conference and support a provision establishing exclusive jurisdiction by each state over its own nationals. See *id.* at 11; Bilder, *Criminal Conduct*, *supra* note 25, at 238 n.21.

57. Antarctic Treaty, art. VIII(1). This provision creates an ambiguity in Article IV(2), which provides that "[n]o acts. . . taking place while the present Treaty is in force shall constitute a basis for. . . supporting or denying a claim to territorial sovereignty in Antarc-

point, the parties provided that in the event of actual dispute they will "consult together with a view to reaching a mutually acceptable solution."⁵⁸

This gap in the Treaty could be a major source of disruption.⁵⁹ The hope that a solution can be achieved on a case-by-case basis is probably unrealistic, considering the important role which the exercise of jurisdiction plays in the perfection of sovereignty. Unless the parties specifically eliminate this problem, it will continue to pose a threat of reawakening the presently dormant sovereignty dispute, thus threatening the future of international cooperation in Antarctica.

II

JURISDICTION IN ANTARCTICA: ESTABLISHED GUIDELINES AND CURRENT PRACTICE

Each of the seven Antarctic claimants has either specifically enacted legislation governing criminal conduct in Antarctica⁶⁰ or considers its

tica or create any rights of sovereignty in Antarctica." A strict interpretation of this language suggests that the exercise of jurisdiction should have no impact on the position of any nation with respect to sovereignty; yet the parties were not able to deal specifically with this delicate point. More significantly, there is no indication that Article IV(2) has led the Antarctic claimants to relax their efforts to satisfy the occupation standard. See AUBURN, *supra* note 5, at 5, 37-38. See also *Argentina's Capital: A Polar Island*, N.Y. Times, August 11, 1976, at 7, col. 2 (reporting an excursion to Antarctica by high officials of Argentina's government, seemingly to "reaffirm" Argentine sovereignty). This continued maneuvering seems to be motivated by the realization that the end of the Treaty regime will undoubtedly be accompanied by a renewed scramble to assert sovereign claims. There is considerable force to the argument that Article IV(2) does not eliminate the significance of completely executed acts which continue in effect beyond the duration of the Treaty. See Bernhardt, *Sovereignty*, *supra* note 18, at 313. This argument seems to contemplate acts such as the establishment of permanent bases, but it is submitted that the argument applies equally to the establishment of a nation's capability of "making its laws respected" in the claimed territory. A nation could accomplish this goal by consistently exercising its jurisdiction within a given territory.

58. Antarctic Treaty, art. VIII(2). In addition, the Treaty provides that meetings shall be held "at suitable intervals and places" for the purpose of considering "measures in furtherance of the principles and objectives of the Treaty." Article IX(1). Among the matters suggested for consideration are "questions relating to the exercise of jurisdiction in Antarctica." Article IX(1)(e). Despite this suggestion, the jurisdictional question has yet to be considered. See BEEBY, *supra* note 3, at 17.

59. BEEBY, *supra* note 3, at 17. Beeby identifies two other problems. The first is the possibility that a non-party to the Treaty could enter Antarctica and refuse to abide by the rules. The second involves the exploitation of any economic resources which may be found on the continent. *Id.* at 17-18.

60. *Australia: Act No. 42 of 1954, Australian Antarctic Territory Act 1954*, reprinted in 7 POLAR RECORD 425 (1955); *Act No. 48 of 1960, Antarctic Treaty Act 1960*, reprinted in 11 POLAR RECORD 302 (1962).

domestic criminal legislation to be applicable in its claimed territories.⁶¹ In addition, nonclaimant South Africa has expressly provided that its domestic legislation applies to criminal conduct by South Africans in Antarctica.⁶² Many nations have seen no need to directly confront the question, but a number of these countries are in a position similar to that of South Africa, since they generally apply at least some of their laws to extraterritorial conduct by their own nationals throughout the world.⁶³

While the theories underlying the various assertions of jurisdiction vary, all concerned nations agree that control of criminal conduct is essential to the continued orderly development of operations in Antarctica.⁶⁴ Nevertheless, due to the potential impact of national legislation

Chile: Act of June 17, 1955, Congreso Nacional Ley No. 11,846, Statute of the Chilean Antarctic Territory, 78 *Diario Oficial* 1321 (June 21, 1955); July 17, 1956, Decreto Supremo No. 298, Ministerio de Relaciones Exteriores, 70 *Diario Oficial* 1922-23 (Oct. 3, 1956).

New Zealand: Act No. 47 of 1960, Antarctica Act 1960, reprinted in 11 *POLAR RECORD* 303 (1962).

Norway: Law of Feb. 27, 1930, No. 3, Norge Lov 1682-1963 & 1247-48, as amended, Law of June 2, 1964, No. 17, Norge Lov 1847-48 (1964).

United Kingdom: British Antarctic Territory Order in Council, 1962, No. 400, and British Antarctic Treaty Order in Council, 1962, No. 401, reprinted in 11 *POLAR RECORD* 306-13 (1962). The Falkland Island Application of Enactments Ordinance, 1954, as amended by the Application of Enactments (Amendment) Regulations 1963 makes certain United Kingdom criminal laws applicable to the British Antarctic Territory.

61. *Argentina:* Law of Feb. 28, 1957, *Boletín Oficial* (March 19, 1957), reprinted in 9 *POLAR RECORD* 52 (1958).

France: Law of Aug. 6, 1955, [1955] J.O. 7979, cited in Hanessian, *National Activities and Interests in Antarctica—Part II: The Claimant Nations*, 2 *AMERICAN UNIV. FIELD STAFF REPS.*, Polar area ser., No. 6 (1962).

62. South African Citizens in Antarctica Act, Act No. 55 of 1962, promulgated by Government Notice No. 826 in 4 *Gazette Extraordinary*, No. 249 (May 25, 1962). The text is reprinted in 11 *POLAR RECORD* 313 (1962).

63. See, e.g., GERMAN PENAL CODE § 3; GREEK CODE OF PENAL PROCEDURE § 3; INDIAN PENAL CODE § 4; JAPANESE PENAL CODE art. 3. See also FUNDAMENTALS OF CRIMINAL LEGISLATION FOR THE U.S.S.R. AND THE UNION REPUBLICS art. 5, 2d Session of the Supreme Soviet of the U.S.S.R., 5th Convocation (Dec. 1958).

64. It is important to note, however, that, despite extensive American activity in Antarctica, the United States does not appear to have provided for the prosecution of cases involving Antarctic transgressions by American civilians. Similarly, it is highly doubtful that conduct by a foreign national at a United States base in Antarctica could be the subject of prosecution in American courts. For an excellent discussion of this apparent gap in American legislation and the implications of that gap, see Bilder, *Criminal Conduct*, *supra* note 25. Auburn suggests that if an American should commit a crime in Antarctica, the courts of the United States would nevertheless be forced "to make some assertion of jurisdiction." AUBURN, *supra* note 5, at 81. This view is bolstered by the outcome in *United States v. Escamilla*, 467 F.2d 341 (4th Cir. 1972). In that case, an American was accused of murdering another American on Fletcher's Ice Island in the Arctic Ocean. Although

upon the Antarctic sovereignty dispute, at least some of these nations have an interest in preventing other nations from actually enforcing their legislation. This dilemma has obvious implications for the future of Antarctic cooperation. This situation demands an examination of traditional jurisdiction theory and an appraisal of its adequacy as a guideline in the special context of Antarctica.

A. TRADITIONAL GUIDELINES

It is well recognized that a nation cannot regulate conduct in a particular set of circumstances unless that nation has some legitimate interest in the outcome. Courts and scholars have devised a number of theories to define the type of connection that a nation must have in order to legitimately exercise its jurisdiction.⁶⁵ Certain principles have emerged, but nations have differed in their application of these guidelines to specific situations. As a result, customary international law is extremely flexible on this point, and few set limitations on the exercise of jurisdiction can be discerned. Scholars have stated that "neither international law nor common-sense judgment" requires a mechanical application of established principles to justify a particular assertion of jurisdiction.⁶⁶

there was considerable doubt whether American legislation covered this type of situation, an equally divided Court of Appeals affirmed the lower court's exercise of jurisdiction over the subject matter of the case. In doing so, the court avoided a possible conflict with Canadian interests by declining to expressly state its reasons for finding a jurisdictional basis. For contrasting views of the result in *Escamilla*, see Auburn, *International Law and Sea-Ice Jurisdiction in the Arctic Ocean*, 22 INT'L & COMP. L.Q. 552 (1973) (disagreeing with the result); Note, *Criminal Jurisdiction Over Arctic Ice Islands: United States v. Escamilla*, 4 U.C.L.A.-ALASKA L. REV. 419 (1975) (contending the court acted upon a proper jurisdictional basis).

65. The leading effort to formulate international guidelines for the proper exercise of legislative jurisdiction is the *Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435 (1935) [hereinafter cited as *Harvard Research*], which suggests a *Draft Convention on Jurisdiction With Respect to Crime*, *id.* at 439-42. The RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) [hereinafter cited as RESTATEMENT], adopts a framework similar to that of the *Harvard Research*. For examples of other scholarly efforts in this field, see 2 TREATISE ON INTERNATIONAL CRIMINAL LAW (M. Bassiouni & V. Nanda eds. 1973); Sarkar, *The Proper Law of Crime in International Law*, 11 INT'L & COMP. L.Q. 446 (1962) [hereinafter cited as Sarkar, *Proper Law*]. For a similar choice of law analysis, see Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 CASE W. RES. L. REV. 44 (1975).

66. Bilder, *Criminal Conduct*, *supra* note 25, at 274; see H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 881 (2d ed. 1976). The opinion of the Permanent Court of International Justice in the *Case of the S.S. "Lotus"* suggests that a particular exercise of jurisdiction need not be affirmatively justified by reference to some established jurisdictional rubric. Instead, the burden is upon a complaining party to demonstrate a restrictive principle which is violated by the assertion of jurisdiction. The court stated:

Nevertheless, three suggested jurisdictional principles provide a particularly useful framework for analysis of the problem in Antarctica.⁶⁷

1. Territorial Principle

The universally recognized theory of territorial jurisdiction allows a state to legislate with respect to conduct occurring within its territory.⁶⁸

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

[1927] P.C.I.J., ser. A, No. 10, at 19. Sarkar deprecates this flexibility, complaining that it gives "plausibility in international law to extravagant new claims to territorial jurisdiction." Sarkar, *Proper Law*, *supra* note 65, at 466.

67. Two other frequently discussed jurisdictional principles could justify legislation with respect to certain activities in Antarctica, although these principles have little application to the present analysis. The *protective principle* allows a state to assert jurisdiction over an alien who has committed extraterritorial acts which threaten the security or integrity of that state. Sarkar, *Proper Law*, *supra* note 65, at 462. The theoretical basis for this principle is the right of self-defense, but its practical justification is found in the inadequacy of national legislation to punish territorial conduct directed against the vital interests of foreign states. *Harvard Research*, *supra* note 65, at 552. According to the *Harvard Research*, the protective principle is "claimed by most States, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence." *Id.* at 445. For a concise discussion of the protective principle, its limits, and its increasing acceptance in modern international practice, see Note, *Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law*, 72 MICH. L. REV. 1087, 1092-97 (1974). The *universality principle* provides that jurisdiction may be asserted, regardless of nationality or place of crime, merely on the basis of custody. This principle is recognized only in the case of crimes that affect the international community or violate international law. See Feller, *Jurisdiction Over Offenses With a Foreign Element*, in 2 TREATISE ON INTERNATIONAL CRIMINAL LAW 5, 32-34 (M. Bassiouni & V. Nanda eds. 1973). Universal jurisdiction over piracy has long been recognized. See *Harvard Research*, *supra* note 65, at 445. War crimes now have a similar status. Garcia-Mora, *Crimes Against Peace in International Law: From Nürnberg to the Present*, 53 KY. L.J. 35, 36-46 (1964). For a discussion of other crimes that have occasionally been suggested as justifiably triggering the universality principle, see Note, *Extraterritorial Jurisdiction*, *supra* at 1097-1100.

68. *Harvard Research*, *supra* note 65, at 480. The territorial principle is founded upon the two tenets of territorial sovereignty and the equality of nations. 1 L. OPPENHEIM, INTERNATIONAL LAW 262 (8th ed. 1955). Chief Justice Marshall described the interrelationship of these tenets:

The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of its restriction, and an investment of that sovereignty, to the same extent, in that power, which could impose such restriction.

This principle has been extended to permit a state to exercise jurisdiction over an act that originates outside its borders, provided that act has substantial direct effects within the territory of the asserting nation.⁶⁹

The territorial principle is the primary basis upon which each Antarctic claimant purports to extend its jurisdiction to Antarctica. Instead of limiting the scope of its jurisdiction to acts committed by its own nationals (or any other similarly limited group), each claimant applies its laws to all conduct within its claimed territory. France and Argentina have not even felt the need to enact special legislation extending their laws to Antarctica—apparently because those nations look on their Antarctic sectors as mere extensions of metropolitan territory, and thus automatically subject to domestic law.⁷⁰

2. Nationality Principle

The nationality (or active personality) theory allows a state to regulate the conduct of its own nationals, regardless of where that conduct takes place.⁷¹ Although all nations recognize this principle, they often

Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812). The acceptance of this principle has an important element of practicality, for it is clear that "[t]he territorial sovereign has the strongest interest, the greatest facilities, and the most powerful instruments for repressing crimes, whether committed by native-born subjects, or by domiciled aliens, in [its] territory." G. LEWIS, FOREIGN JURISDICTION AND THE EXTRADITION OF CRIMINALS 30 (1859), quoted in *Harvard Research*, *supra* note 65, at 483.

69. See RESTATEMENT, *supra* note 65, at § 18. This extension is often described as the theory of "objective territoriality." See *Harvard Research*, *supra* note 65, at 487-88. For a discussion of American and British cases that support this extension, see *id.* at 488-91. For a more recent discussion, see Bassiouni, *Theories of Jurisdiction and Their Application in Extradition Law and Practice*, 5 CALIF. W. INT'L L.J. 1, 11-19 (1974) [hereinafter cited as Bassiouni, *Jurisdiction*]. See also Sarkar, *Proper Law*, *supra* note 65, at 452-56. The "law of the flag" concept is a further extension of the territorial principle. This concept adopts the fiction of "floating territoriality," thereby allowing nations to exercise jurisdiction over acts committed aboard vessels entitled to fly the flag of the asserting state. See Bassiouni, *Jurisdiction*, *supra* at 19-34. For a statement of this concept couched in terms of the nationality principle, see Convention on the High Seas, *done* at Geneva, April 29, 1958 [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, art. 5. In the *Case of the S.S. "Lotus," supra* note 66, the Permanent Court of International Justice dealt with a collision on the high seas in which acts committed aboard a French ship produced unintended effects on a Turkish vessel. In finding that Turkey could properly exercise jurisdiction over the responsible Frenchman, the court assimilated the Turkish vessel to Turkish territory. This result effectively recognized the propriety of both extensions of the territoriality principle—the theory of "objective territoriality" and the "law of the flag" concept. See BRIERLY, *THE LAW OF NATIONS* 308 (1955).

70. For a concise discussion of the relevant legislation, see Bilder, *Criminal Conduct*, *supra* note 25, at 260-63.

71. *Harvard Research*, *supra* note 65, at 519. This theory stems from the idea that all persons owe a duty of allegiance to the state of their nationality. *Id.*; Sarkar, *Proper Law*,

differ substantially as to the manner and extent of its application.⁷²

The nationality principle has been utilized to justify the regulation of activity in Antarctica. This is true not only of nonclaiming states,⁷³ which necessarily cannot assert jurisdiction on the basis of territoriality, but of some claiming states as well. For instance, in addition to asserting jurisdiction within their claimed areas, Australia, New Zealand, and the United Kingdom purport to regulate activity of their own nationals throughout the Antarctic continent.⁷⁴

3. *Passive Personality Principle*

The passive personality theory gives a state legislative jurisdiction over offenses committed against the person or property of its nationals, regardless of the nationality of the perpetrator and the location where the wrong took place.⁷⁵ A few countries support this principle,⁷⁶ but it has been expressly repudiated by others and has been severely criticized by scholars.⁷⁷ In addition, the decision of the Permanent Court of Inter-

supra note 65, at 456-57. For a critical appraisal of the nationality principle, see *id.* at 456-62. See also *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909), where Holmes suggests that the application of the nationality principle to an offense committed abroad can be regarded as "an interference with the authority of another sovereign, contrary to the comity of nations, which the other State concerned justly might resent."

72. For example, while some nations apply their laws to minor extraterritorial crimes committed by their nationals, others do so only in the case of the most heinous offenses. See Sarkar, *Proper Law*, *supra* note 65, at 457-58. For a thorough discussion of these differences, see *Harvard Research*, *supra* note 65, at 519-39. See also Bassiouni, *Jurisdiction*, *supra* note 69, at 41.

73. See notes 62-63 *supra* and accompanying text.

74. See Bilder, *Criminal Conduct*, *supra* note 25, at 261.

75. The passive personality theory is based upon the premise that the state's ultimate welfare depends upon the welfare of its nationals. The argument is that the state has a legitimate interest in asserting jurisdiction over those who threaten that welfare. Bassiouni, *Jurisdiction*, *supra* note 69, at 44.

76. For a comment on an Israeli statute based upon this principle, see Note, *Extraterritorial Jurisdiction*, *supra* note 67.

77. The Anglo-American countries have vigorously opposed the passive personality principle. *Harvard Research*, *supra* note 65, at 579. Some maritime conventions have expressly prohibited contracting parties from relying on this theory to assert jurisdiction. See International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collisions and Other Incidents of Navigation, signed at Brussels, May 10, 1952, 439 U.N.T.S. 233; Convention on the High Seas, *supra* note 69, art. 11(1). Both the *Restatement*, *supra* note 65, at § 30(2), and *Harvard Research*, *supra* note 65, at 579, reject the passive personality principle. *Harvard Research* concludes that this theory invites needless controversy, especially since its desirable objectives are adequately served by other principles. *Id.* For the classic American position, see Moore, *Report on Extraterritorial Crime and the Cutting Case*, FOREIGN REL. U.S. 757 (1887), strongly attacking the passive personality principle.

national Justice in the *Case of the S.S. "Lotus"*⁷⁸ casts strong doubt upon the validity of the passive personality principle, other than as a mere auxiliary basis of jurisdiction.⁷⁹ It appears that no nation has attempted to extend the reach of its laws to Antarctica on the basis of this principle.

B. INADEQUACY OF TRADITIONAL GUIDELINES IN THE CONTEXT OF ANTARCTICA

While established jurisdictional principles provide a useful framework for analyzing the jurisdictional problem that has arisen in Antarctica, they should not divert attention from considerations peculiar to that problem. Traditional guidelines for the exercise of jurisdiction developed from actual international practice in circumstances unlike the unique situation that prevails in Antarctica. It should not be assumed that the extreme flexibility of these guidelines is appropriate in the context of Antarctica. If the era of Antarctic cooperation is to continue, the concerned nations must consider these guidelines in light of the delicate balance of national sensitivities that prevails on the continent.

The flexibility of customary jurisdictional guidelines inevitably leads to situations where more than one nation has a legitimate basis for applying its law. While no definite standards dictate which nation should yield in such a situation, the common practice is to defer to the jurisdiction of the nation that has a territorial basis for asserting its jurisdiction.⁸⁰ This informal system has been effective in avoiding con-

78. [1927] P.C.I.J., ser. A, No. 10.

79. The court did not expressly reject the passive personality principle, which was the basis for Turkey's prosecution of a French naval officer. However, in the process of finding other justifiable grounds for Turkey's exercise of jurisdiction, the court hinted that there is little foundation for the passive personality concept as a proper jurisdictional basis. A number of judges indicated strong disapproval of the theory. See Bilder, *Criminal Conduct*, *supra* note 25, at 273 n.129.

80. This deference is commonly expressed in national legislation, which tends to confirm the view that other principles merely provide jurisdictional bases subsidiary to the territorial jurisdiction of the state in which the crime was committed. See *Harvard Research*, *supra* note 65, at 531. See also Auburn, *International Law and Sea-Ice Jurisdiction in the Arctic Ocean*, 22 INT'L & COMP. L.Q. 552, 556 (1973), arguing that the American exercise of jurisdiction in *United States v. Escamilla*, *supra* note 64, if based upon nationality, represented a denial of sovereign Canadian claims. It appears, however, that international law leaves each nation free to determine this matter for itself. *Harvard Research*, *supra* note 65, at 531. See Sarkar, *Proper Law*, *supra* note 65, at 459, noting the "grave potential dangers" inherent in a system which allows more than one nation to concurrently assert jurisdiction in a particular case. See also 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 226-27 (1941). In *United States v. Flores*, 289 U.S. 137, 158 (1933), the Supreme Court stated: "There is not entire agreement among nations or the writers on international law

flict, even though many nations regard the exercise of jurisdiction as a basic element of their sovereignty and are therefore reluctant to relinquish jurisdiction.⁸¹

If a case of competing jurisdiction should arise in Antarctica, this reluctance would undoubtedly be magnified. No nation would be likely to relinquish jurisdiction in favor of the asserted territorial jurisdiction of a nation whose claim it does not recognize.⁸² This reluctance would be enhanced by the fear that the other nation's exercise of jurisdiction could be a significant step toward perfecting its claim.⁸³ The situation would be particularly troublesome if each nation were asserting jurisdiction on the basis of territoriality—a situation that could easily arise in the disputed Palmer Peninsula region.⁸⁴ The traditional practice of deferring to the territorial sovereign would obviously be of no help. Furthermore, it is unlikely that the concerned nations would be willing to simply defer to the initial asserter. This solution would be contrary to the interest that each nation has in refusing to recognize the other's jurisdiction—an interest that could even lead one state to exercise jurisdiction despite a prior prosecution by the rival claimant.⁸⁵ In addition to subjecting the particular offender to double jeopardy, this sort of conflict would pose a clear threat to the future of Antarctic cooperation.

Unless the future of Antarctic cooperation is to rest upon the hope that the frozen continent will remain free from crime, it is apparent that a new accommodation of interests is necessary. Due to the continual increase of human activity in Antarctica, this problem becomes more pressing with the passage of time.

as to which sovereignty should yield to the other when jurisdiction is asserted by both." This situation seems to be governed by principles of public policy and international comity. See *United States v. Reagan*, 453 F.2d 165 (6th Cir. 1971), *cert. denied* 406 U.S. 946 (1972).

81. See Sarkar, *Proper Law*, *supra* note 65, at 469.

82. This would be true even if the conflict involved a nonclaiming state, such as the United States or the Soviet Union. It is possible that in this type of case the territorial claimant would be willing to relinquish jurisdiction, since to do so would involve no recognition of a competing claim. See *generally* *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 124 (1923), emphasizing that considerations of public policy may well lead the territorial sovereign to "forego the exertion of its jurisdiction or to exert the same in only a limited way." However, such a waiver would be unlikely, particularly on the part of the United Kingdom, Chile, or Argentina, each of which must worry about even indirectly impairing its position with regard to the overlapping claims of those nations.

83. See notes 45-56 *supra* and accompanying text.

84. For a discussion of the dispute over sovereignty in the Palmer Peninsula, see notes 13-15 *supra* and accompanying text.

85. For a discussion of the double jeopardy problems that have arisen in similar situations, see Sarkar, *Proper Law*, *supra* note 65, *passim*. For a discussion of traditional safeguards, see *Harvard Research*, *supra* note 65, at 602-16.

III

TOWARD A RESOLUTION

Nations concerned with developments in Antarctica hold certain fundamental interests in common. Each nation has a stake in preventing the proliferation of uncontrolled criminal conduct. At the same time, the unique Antarctic experience requires that jurisdiction over such conduct be exercised in a manner calculated to avoid international conflicts that could disrupt the prevailing cooperative regime. The goal of a new approach must be to mold inadequate (indeed, nearly non-existent) international guidelines into a jurisdictional scheme that will promote commonly held interests without offending conflicting national positions on the sovereignty question. The conclusion is inescapable that, in order to preserve harmony, territoriality must be rejected as a basis for the assertion of jurisdiction in Antarctica. It is equally clear that this rejection should not be allowed to impair the status of national claims—however questionable those claims may be considered by other nations.

A. PROPOSED JURISDICTIONAL SCHEME: EMPHASIZING NATIONALITY
RATHER THAN SOVEREIGNTY

Several nations may have interests that are sufficient to justify their application of national law to a particular set of circumstances. If emphasis is removed from the place where the act occurred, the exercise of jurisdiction must depend upon a connection between the asserting state and a concerned individual—either the perpetrator or the victim.⁸⁶ Since nationality generally provides the most definite and uniformly understood connection between a state and an individual, the new Antarctic formula should focus upon an application of either the nationality or passive personality principle (both of which emphasize this connection), or upon a combination of these principles.

The nationality principle, which finds a proper jurisdictional basis in the nationality of the perpetrator, has received far greater acceptance than the passive personality principle, which emphasizes the nationality of the victim.⁸⁷ At first blush, this fact alone would seem to dictate that a new Antarctic scheme be based upon an exclusive application of the

86. In addition, a nation would be justified in exercising jurisdiction over certain activities, regardless of the place where they occur or the nationality of the individuals involved, if they threatened the asserting nation's vital interests or those of the international community. See note 67 *supra*.

87. See notes 71-72 & 75-79 *supra* and accompanying text.

nationality principle. By totally eliminating the territoriality issue, this measure would significantly reduce the potential for jurisdictional conflict. Nevertheless, it is doubtful that such a scheme would fully meet the needs of the situation.

The primary goal of any jurisdictional system must be to assure that wrongdoers are brought to justice. The flexibility of current international practice attempts to achieve this goal by allowing almost any interested nation to apply its laws to a particular case. If one of these nations should fail to exercise its jurisdiction, it is likely that another interested state will deal with the situation. This inherent gap-filling mechanism could not operate in Antarctica if the new formula were to vest exclusive jurisdiction in the state whose national committed the act. Even more significantly, an exclusive nationality scheme would provide no recourse against a stateless Antarctic wrongdoer. Consequently, the new Antarctic accommodation must replace the flexibility of international practice by supplementing the nationality scheme with a specific gap-filling procedure.

As a first step, the concerned nations should explicitly recognize the passive personality principle as a subsidiary basis for the application of national laws to Antarctic activity. Since this principle has not been widely accepted, it is necessary to examine objections to its invocation in the context of its proposed implementation as a gap-filling mechanism in Antarctica.

According to traditional wisdom, the territorially interested state and the state whose national has gone astray both have a greater interest in controlling criminal conduct than has a state whose only connection with the case is an injury to one of its nationals. Consequently, an assertion of jurisdiction solely on the basis of the victim's nationality can be viewed as an interference with the sovereignty of those states. Since the wrongdoer is likely to be prosecuted in any event, such an assertion can only invite needless controversy with nations who feel that their sovereignty has been slighted.⁸⁸

An objection based on this line of reasoning would have little force in the context of the new Antarctic formula. In the absence of a territorially interested state, even those who support the traditional position would agree that the state whose national has been injured has an interest second only to that of the state whose national committed the wrong. Undoubtedly, cases must arise in which the national state of the accused fails to carry out the prosecution or is unable to do so because it has not extended its laws to cover activity of its nationals in Antarctica. In a

88. See *Harvard Research*, *supra* note 65, at 579.

case such as this, or in one involving a stateless defendant, the injured party's state would have the primary interest in bringing the wrongdoer to justice.⁸⁹ Under these circumstances, an exercise of jurisdiction by the passive personality state would satisfy the need to fill jurisdictional gaps without infringing the sovereignty of other nations.⁹⁰

This scheme leaves a further jurisdictional gap which would be troublesome if a case should arise in which the nations of all concerned individuals have failed to extend their laws to cover Antarctic activity or in which only stateless persons are involved. Such a case may be uncommon, but the possibility is sufficiently clear to require that a further gap-filling mechanism be included in the new scheme. The best solution would be to recognize the right of any Treaty party to assert jurisdiction in such a case. Although the community interest in preventing the proliferation of crime provides an unusual justification for the application of national law, the occasion for the invocation of this mechanism would be so rare that it is unlikely to raise any objection on the part of other nations—especially since the alternative would be to allow the offender to go unpunished.⁹¹

The foregoing jurisdictional scheme should be adopted through an amendment to Article VIII of the Antarctic Treaty.⁹² The following language is suggested as a model.⁹³

89. *Harvard Research* uses a substantially identical rationale to justify assertions of jurisdiction in similar situations. Although it uses this rationale in the context of the universality principle, the accompanying discussion indicates that it borrowed the justification from past discussions and applications of the passive personality principle. See *Harvard Research*, *supra* note 65, at 589-91. The same discussion touches on the question of whether justice is served when a person is subjected to the laws of a nation with which he may have had no prior contact and, therefore, no reason to be aware of that nation's position on the value judgments inherent in any legal system. This should present no problem for the proposed scheme, so long as the act for which the defendant is to be prosecuted caused a genuine injury to the national of another state. In the case of acts or omissions that cannot truly be described as *mala in se*, it is possible that ignorance of law would be a good defense. See *id.* at 590.

90. The proposed scheme adopts a hierarchy in which the passive personality state is entitled to exercise jurisdiction only when the state of the wrongdoer's nationality has failed to do so. A scheme in which each of these nations is granted concurrent jurisdiction might be equally viable, with jurisdictional conflicts being settled through international comity. Nevertheless, the need to avoid potential disputes in Antarctica indicates that the hierarchical arrangement would be the safer course.

91. This notion is not entirely novel. *Harvard Research*, in its discussion of the universality principle, advocates a similar jurisdictional basis. See *Harvard Research*, *supra* note 65, at 591-92.

92. For a discussion of the present provisions of Article VIII, see notes 55-58 *supra* and accompanying text.

93. A scheme that allocates jurisdiction in terms of absolute principles is open to the objection that jurisdiction thus defined may be abused. Potential problems may arise in

ARTICLE VIII

In the case of acts or omissions that occur in Antarctica during the course of this Treaty regime, no person shall be subjected to the jurisdiction of any State, other than:

1. the State or States of which he is a national; or
2. a State whose national has been injured by the act or omission in question, *provided* the State or States referred to in paragraph 1 of this Article have refused prosecution or have otherwise failed to assert jurisdiction; or
3. any Contracting Party, *provided* no other State is entitled to assert jurisdiction by virtue of paragraph 1 or 2 of this Article or all States referred to in those paragraphs have either refused prosecution or otherwise failed to assert jurisdiction.

B. STATUS QUO STILL FROZEN

Since all nations attach tremendous importance to the exercise of territorial jurisdiction, it may prove difficult to convince nations clinging to Antarctic claims to adopt a scheme that discards the jurisdictional significance of sovereignty. This is particularly true since, notwithstanding their expressed desire to freeze the status of sovereign claims, those nations seem to treat the exercise of territorial jurisdiction as a potentially important aspect of their efforts to perfect their territorial claims.⁹⁴ Nevertheless, those nations have little choice but to adopt the proposed scheme if they truly wish to assure the continued viability of the cooperative regime in Antarctica. This course would be more acceptable to claiming states if it were clearly understood that, by refusing to exercise jurisdiction on a territorial basis, they will not be relinquishing their claims to sovereignty.

Although territorial jurisdiction is one of the traditional trappings of territorial sovereignty, it is axiomatic that the two are not inseparable. It is not uncommon for a nation to surrender a portion of its jurisdictional authority, even within its own borders, when to do so furthers national interests.⁹⁵ It would be difficult to argue that this practice

a number of respects, among them: the manner in which custody is acquired, the type of treatment to which the accused is subjected, the fairness of judicial proceedings, and the possibility of double jeopardy. For a discussion of generally accepted safeguards, see *Harvard Research*, *supra* note 65, at 596-632.

94. This problem proved to be an insurmountable obstacle during the original Treaty negotiations. See notes 55-56 *supra* and accompanying text.

95. For example, most nations are allowed to exercise jurisdiction over members of their armed forces, regardless of their location. See *RESTATEMENT*, *supra* note 65, at § 31(b); Bassiouni, *Jurisdiction*, *supra* note 69, at 11 n.26. For a discussion of this practice of surrendering jurisdictional authority, see *id.* at 7-11.

impairs the relinquishing state's sovereignty—especially when the surrender is clearly temporary and is freely entered into by the relinquishing state. Moreover, the parties to the Antarctic Treaty have already agreed that actions taken during the Treaty regime “shall not constitute a basis for. . .denying a claim to territorial sovereignty in Antarctica. . . .”⁹⁶ The adoption of a new jurisdictional scheme would seem to be precisely the sort of action that this language was designed to cover.⁹⁷

Consequently, there is no reason to suppose that the proposed scheme will threaten the delicately balanced status quo. On the contrary, by defusing a potentially explosive issue, the proposed scheme will contribute to the perpetuation of the cooperative regime in Antarctica.

CONCLUSION

The Antarctic model for international cooperation is founded upon a delicately balanced understanding of the legal status of territorial claims in Antarctica. Until now, each concerned nation has been satisfied that its position is protected with regard to the recognition or non-recognition of claims. The implementation of national criminal laws in claimed areas—a privilege inherent in sovereignty—threatens to upset the balance. If the era of Antarctic good feeling is to continue, it is imperative that the concerned nations forge a new jurisdictional accommodation. This accommodation must remove territoriality as a basis for the exercise of jurisdiction and focus upon the nationality of the individuals involved in each case. If jurisdiction is to be vested in the states whose nationals are involved, it must be understood that the new accommodation prejudices the position of no nation with regard to the dispute over sovereignty in Antarctica.

Eric W. Johnson

96. Antarctic Treaty, art. IV(2).

97. It has been suggested that the provision containing this language would not erase the legal significance of completely executed acts which continue in effect beyond the duration of the Treaty. See Bernhardt, *Sovereignty*, *supra* note 18, at 313. Although this interpretation carries a great deal of force, there is no reason to assume that it would apply to the temporary relinquishment of territorial jurisdiction. If the amendment implementing the new scheme were to include language clearly indicating that the relinquishment of territoriality shall continue only for the duration of the Treaty regime, any possibility of running afoul of this interpretation would be eliminated.